BOOK REVIEW

MARCELLE BURNS[1]

Larissa Behrendt, Chris Cuneen and Terri Libesman, *Indigenous Legal Relations in Australia* (Oxford University Press, Melbourne 2009) 376pp.

Indigenous Legal Relations in Australia is a welcome and refreshing addition to the current literature on Indigenous legal issues. Written by a team of highly qualified Indigenous and non-Indigenous academics who share a long term commitment to Indigenous legal and social justice issues,[2] this book provides a clearly written and accessible introductory text for tertiary students and general readers alike who are seeking to gain a deeper understanding of the relationship between Indigenous Australians and the Anglo-Australian legal system.

The book is very topical in that it engages readers in a number of key debates that are currently taking place in the Australian political and legal landscape such as the Australian Human Rights Commission's consultations on human rights and a possible Bill of Rights, the formation of a new national Indigenous representative body, Prime Minister Rudd's proposal to amend the constitution to recognise the unique status of Indigenous Australians, and renewed calls for compensation for members of the Stolen Generations following the Prime Minister's historical apology on 13 February 2008. The text provides a well argued and compelling critique of the Federal Government's Northern Territory intervention and draws connections between current government policy and historical practices that ignored the fundamental human rights of Indigenous Australians. It also explores the potential for the greater recognition of

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[2] Robynne Quiggin is also a major contributor to the text.

Indigenous rights by Australia endorsing and implementing the United Nations *Declaration on the Rights of Indigenous Peoples*[3].

The text examines Indigenous legal issues with reference to a number of themes as a framework for analysing the relationship between Indigenous Australians and the Anglo-Australian legal system:

- The importance on history is emphasised to understand the current relationship between Indigenous Australians and the mainstream legal system;
- The central role Indigenous political struggle continues to have in achieving recognition of Indigenous rights;
- The pervasiveness of racial discrimination as a context for comprehending the barriers preventing Indigenous Australians participating more fully in Australian society;
- International human rights standards as a measure to assess the extent to which Indigenous peoples enjoy rights in the Australian context;
- The need for Indigenous participation in decision making regarding law and policy issues affecting Indigenous Australians; and
- The limitations of Anglo-Australian law in providing recognition of Indigenous rights as articulated through Indigenous law and custom.

The text is divided into four parts which engage with the above themes in different ways. *Part 1 The Law of the Colonisers* discusses the historical, social and political context of the colonisation of Australian and links historical injustices to the present relationship between Indigenous peoples and the mainstream legal system. Chapter 1 explores the ways in which British laws were imposed on Indigenous Australians through the wrongful application of the doctrine of *terra nullius*, and the subsequent denial of Indigenous rights. Chapter 2 examines the effects of historical government policies to regulate and control the lives of Indigenous from the introduction of 'protection' legislation in the late 1800s, to later policies designed to assimilate Indigenous Australians into the general population and discusses the findings of the

[3] 13 September 2007, GA Res 61/295.

National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families (NISATSIC).[4] Chapter 3 considers compensation for the Stolen Generations and lost wages with reference to the recommendations of the NISATSIC for restitution in conformity with international human rights legal principles. Chapter 4 explores contemporary Indigenous child welfare issues and the links between historical child protection policies, inter-generational trauma, structural inequality and the current over-representation of Indigenous children in substitute care.

Part 2 Equal before the Law: Criminalisation provides a critique of normative Anglo-Australian law and seeks to explain the continuing over-representation of Indigenous Australians in the criminal justice system. Chapter 5 deals specifically with Indigenous juveniles and how the unequal exercise of police discretion leads to Indigenous juveniles being dealt with in more punitive ways that their non-Indigenous counterparts. Chapter 6 also discusses issues concerning policing and Indigenous peoples with the authors showing how over-policing, inappropriate police responses to family violence and the policing of public space contribute to poor Indigenous-police relations, the criminalisation of Indigenous peoples, high levels of victimisation in Indigenous communities and in extreme cases Indigenous deaths in custody. Chapter 7 deals with sentencing and punishment of Indigenous offenders and alternative sentencing processes. The recent emergence of Indigenous sentencing courts and community based sentencing options are also explored for their potential to reduce recidivism and Indigenous over-representation in the criminal justice system.

Part 3 Law, Land and Culture provides an overview of the means of achieving land justice for Indigenous Australians through the common law, land rights and native title processes and also canvasses the capacity of the Anglo-Australian laws to recognise, respect and protect Indigenous knowledge and cultural heritage. Chapter 8 chronicles Indigenous political struggles for land and significant cases which led to the introduction of statutory land rights schemes in the Australian states and territories. Chapter 9 discusses the development of native title law in Australia from

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[4] Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, Commonwealth of Australia, Canberra, (1997).

the common law recognition afforded in *Mabo v Queensland (No2)*[5] to the introduction of the *Native Title Act 1993* (Cth). Chapter 10 outlines the scope of Indigenous knowledge and cultural property and heritage and assesses the capacity of Anglo-Australian laws to recognise and respect the rights and responsibilities of Indigenous Australians to protect Indigenous cultural heritage.

Part 4 Law, Rights and Governance draws on the international human rights framework to deconstruct Australian governments' political and legal responses to racial discrimination and equality issues, governance of Indigenous affairs, and Indigenous self determination and sovereignty rights. Chapter 11 focuses on *Racial Discrimination Act 1975* (Cth) (*RDA*) and analyses its effectiveness in implementing the United Nations *Convention on the Elimination of Racial Discrimination*[6] and in addressing systemic discrimination. Chapter 12 argues the case for constitutional change to address the lack of rights protection for Indigenous Australians through the existing common law, statutory and constitutional frameworks. Chapter 13 deals with issues of governance, the importance of Indigenous participation in the development of law and policy, and highlights the need for a national Indigenous representative body. Chapter 14 sets out how international human rights law and the *Declaration on the Rights of Indigenous Peoples*[7] - which has now received the support of Australia - provides a strong foundation for the recognition of the right of self determination for Indigenous Australians[8]. Chapter 15 discusses the issue of reconciliation and the recommendations of the former Aboriginal and Torres Strait Islander Commission and the Council for Aboriginal Reconciliation to acknowledge the sovereign rights of Indigenous Australians through the negotiation of a treaty, and creating greater social and economic equity for Indigenous Australians. Broad structural and institutional changes are recommended to achieve these goals within a human rights framework.

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[5] (1992) 175 CLR 1.

[6] Opened for signature 21 December 1965, GA res 2106 (xx) (entered into force 4 January 1969).

[7] 13 September 2007, GA Res 61/295.

[8] The Hon Jenny Macklin, Federal Minister for Families, Housing, Community Services and Indigenous Affairs, *Statement on the United Nations Declaration on the Rights of Indigenous Peoples*, (Speeched delivered at Parliament House, Canberra, 3 April 2009).

The format of *Indigenous Legal Relations in Australia* is well suited for use as a tertiary text with each chapter containing a number of discussion questions to direct students into more detailed analysis of the subject matter. Case studies are also included which provide real world examples and illustrate how specific legal problems impact on Indigenous peoples on an individual and collective level. In this way the experience of Indigenous Australians under Anglo-Australian law comes to life and the overarching issues of injustice and discrimination are personalised and accentuated. The text also includes comparative case studies from jurisdictions with similar colonial histories such as Canada to demonstrate alternative ways of dealing with a number of the legal issues facing Indigenous Australians.

For a text it is notable for not being overly legalistic and yet it is remarkable for its ability to distil a number of complex and detailed concepts into clear and accessible language. At the same time *Indigenous Legal Relations in Australia* presents a sophisticated and compelling argument for greater recognition of Indigenous rights through a restructuring of the relationship between Indigenous and non-Indigenous Australians. The book is well researched and contains an extensive bibliography which directs the reader to a wide range of references that provide more detailed information on Indigenous legal issues. The text can also easily be supplemented by a reading of selected cases where more in depth study of the topic area is required. Therefore the book lends it self to a wide audience who are engaging with Indigenous legal issues on many different levels.

Indigenous Legal Relations in Australia is optimistic in its outlook and seizes the moment to set a more positive direction for Indigenous affairs with the election of the Rudd Labor Government and the impetus created by the Prime Minister's apology to Indigenous Australians. In many ways this book elaborates on Behrendt's call for greater acknowledgement of Indigenous rights made in *Achieving Social Justice: Indigenous Rights and Australia's Future*,[9] which is supported and fully amplified by the contributions of the co-authors. It also provides a comprehensive critique of the normative Anglo-Australian legal system and the Howard Government's wholesale

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[9] Behrendt L, *Achieving Social Justice: Indigenous Rights and Australia's Future,* Federation Press, Sydney, 2003.

denial of Indigenous rights, yet remains forward looking by highlighting how such rights *can* be realised with a renewed commitment to reconciliation and a willingness to address the structural changes necessary to enable greater recognition of the inherent sovereign rights of Indigenous Australians. The book certainly achieves its aim to 'introduce students and readers to the major issues facing Aboriginal and Torres Strait Islander people in their contact with the Anglo-Australian law and legal institutions…and engage readers in some key debates around Aboriginal and Torres Strait Islander issues.'[10] *Indigenous Legal Relations in Australia* is a timely edition to the academic literature on Indigenous legal issues and it set to become a core text for Indigenous legal studies in the post-apology era.

[10] Behrendt L, Cuneen C, and Libesman T, *Indigenous Legal Relations in Australia*, Oxford University Press, South Melbourne (2009), xi.